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No.08342

Supreme Court, U.S.
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IN THE SUPREME COURT OF UNITED STATES

OCTOBER TERM ,2008

CHARLES KIRK DIGGS, Petitioner,

v.

DAVID DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1)vacating its denial for Writ of Certiorari, entered on October 20, 2008, and (2) granting the petition. As grounds for this motion, petitioner states the following:

This motion for rehearing is requested based on intervening circumstances of substantial and controlling effect and to other substantial grounds not previously presented.

1. While this case represented the question was the Sixth Amendment right to assistance of counsel at post trial stage, waivable without a colloquy, and that Faretta v. California,95 S.Ct 2525 (1975) did not go far enough in explaining that a petitioner can only waive counsel after a colloquy " with eyes open." Petitioner presented to this court, a split among the circuits, and the states relating to what level of inquiry should

be given by the trial judge, before allowing a defendant to waive counsel.

Petitioner in his Certiorari presented, the position that, in Strickland v. Washington,466 U.S.668 ,691-692 (1984), this court held that a defendant is entitled to effective assistance of counsel in a capital sentencing. This court, also ruled the same way in Williams v. Taylor, 120 S.Ct.1495 (2000), held that capital sentencing, petitioner was denied his Sixth Amendment rights to effective counsel.

Recent ruling's from this court creates important reasons for this court to grant a rehearing, and grant this motion; First, the recent decision's by this court, has not addressed the conflict among the circuits. In Indiana v Edwards, 128 S.Ct. 2379 (2008), this court reviewed Faretta, under the question whether a mentally challenged defendant was entitled to represent himself even if he was mentally ill. The state forced counsel on Edwards. The Indiana courts reversed, and permitted a new trial. This court ruled that the state had the right to force counsel upon Edwards, in order to ensure a fair trial. The circuits are split on what extent, should the colloquy be in order to waive counsel. This court emphasized that, " The Sixth and Fourteenth Amendment of our Constitution guarantee that a person brought to trial in any state or federal court, must be afforded the right to the assistance of counsel before he can be "validly convicted and punished by imprisonment." U.S..C.A Amend 6. Id Faretta at 807. In Martinez v. Court Of Appeal of California, 120 S.Ct. 684 (2000), this court held counsel is only attached at trial, and not for

a appeal for Sixth Amendment purposes. In Martinez, this court by Justice Stevens held, petitioner had no constitutional right to represent himself on appeal under the Sixth Amendment.

The arguments continues on, when Counsel attaches under the Sixth Amendment, in Rothgery v. Gillespie, 128 S.Ct 2578 (2008), this court held when the right of counsel attaches, is at the initial appearance before a judicial officer. The court goes on to discuss the preliminary hearing; suppression; identifications proceedings, arraignments. In all of the court's ruling's, the court maintained the judicial duty of the trial court to conduct a knowing, intelligent, voluntary waiver of counsel. In Rothgery this court discusses critical stages attaches for Effective Sixth Amendment right to counsel.

However, in spite of this court's ruling when the Sixth Amendment attaches, the circuits are split on the question of when does the Sixth Amendment attaches, in post trial proceedings which includes sentencing. The circuits are split on this area of law. In United States v. Crawford,487 F.3d 1101 (2007 8th circuit) held that the failure to appoint counsel, was harmless error. Other circuits rejected harmless error analysis See U.S. v. Virgl 444 F.3d 455-56); U.S. v. Salemo, 61 F.2d 214 (3rd circuit 1995); U.S. v. Barlough, 820 F.2d 1485 (9th circuit) lack of counsel not harmless error; Tenth circuit not harmless error for lack of counsel Allen 895 F.2d 1577 (10th circuit). Menefield v. Borg,881 F.2d696 (9th circuit 1989) attachment of counsel under the SIxth Amendment attaches at post trial stage, for it is a critical stage of the trial process. It is a post trial proceeding

challenging the conviction, and the potential punishment, based on the juries verdict of guilt.

Justice Ginsburg wrote the opinion of the court in Iowa v. Tovar 124 S.Ct 1379, 541, U.S. 77; and held that counsel is required at all critical stages of the process, no matter if it is a misdemeanor or felony ranks as a critical stage.

This court should grant the Certiorari in light of a recent case this court vacated, and remanded: U.S. Bennett 219 Fed appx 265 (3rd circuit 2007) Bennett v. US, No:078178, May 12,2008-2008 WL -2002034 vacated in light of Penson v. Ohio, 488 U.S. 75. 105 S.Ct 346, 102 L.ed 2d 300 (1988). These decisions from this court, has not completed the task of resolving the split in the circuits concerning the right or not, for counsel at post trial, and sentencing which is part of the adversarial process; which is a critical stage. As the court held in Faretta, Martinez, Edwards that the Sixth Amendment right to assistance is required before he can be validly convicted and punished by imprisonment. This ruling is represented in all this court's decisions. A reasonable reading of this plain statement would only suggest that the person is entitled to assistance of counsel at post trial, and sentencing, because those stages are critical stages of the adversarial proceedings. Equally, evident is that substantial federal constitutional positions are made at that stage challenging the unconstitutional conviction based on pre-trial, and trial errors that may have took place. Ineffective assistance of counsel issues alleged at trial or at pre-trial are brought forth at post trial.

The eight circuit in Robinson v. Norris,60 F.3d 457 (8th cir.1995) has attached a Sixth Amendment right to counsel at sentencing, where the sentencing judge after sentence informed petitioner that he could file pro se petition for new trial claiming ineffective assistance of counsel. The prejudice was presumed.

The purpose of post trial proceedings in Pennsylvania is to present all constitutional violations that affect substantial rights. Petitioner argues that this rehearing petition should be granted because this court should correct the wrong judgment, but more importantly, the court should resolve the splits on two Sixth Amendment Questions, that is having a confusing affect upon thousands of courtrooms in the nation. Herb v. Pitcair 324 U.S. 117, 126 (1945).

Rehearing is necessary to resolve the split in the circuits relating to two structural errors related to the Sixth Amendment. Petitioner argues that this is of first impression for this court to grant Certiorari on two important Sixth Amendment structural errors related directly to Faretta. Some of the Justices have suggested that Faretta be looked at again. Petitioner urges this is the case.

Petitioner filed 11 post trial motions pro se. He motioned the state court for appointment of counsel. The court never conducted a colloquy of any form relating to petitioner's dismissal of trial counsel. What the trial court did was appoint a attorney Thomas Moore, as backup counsel without conducting any colloquy. Thomas Moore never interviewed petitioner or prepared

anything at all for post trial or anything else.

There was just reason for petitioner to represent himself.

Petitioner was entitled under the Sixth Amendment to have assistance of counsel for post trial and sentencing to challenge the validly of the conviction and possible sentence. Id Faretta Id at 2557. But, Faretta, conflicts with Strickland, because Strickland states that the Court need not consider the role of counsel in an ordinary sentencing which may involve informal proceedings, and standardless discretion in the Sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. This Court goes on to relate a death sentence proceedings with a trial.

Petitioner suggests that this court grant rehearing, and grant this motion and take up the question this court posed in Strickland. Petitioner was sentenced to a life term to run consecutively to another Life term. However, at petitioner's first convicting trial, the Life term was run concurrently. After the new trial was granted from the federal district court based on a Batson v. Kentucky violation, petitioner was reconvicted and was punished for obtaining a new trial and thus given a consecutively sentence without any new evidence being presented by the prosecution. Clearly, this is proof of the need for counsel at such a critical stage. It is a tangible prejudice. Without counsel before the adversarial system, before a prosecution who tells the jury his father is a Baptist Minister of 50 years, and that he, the prosecutor, could have been a judge or something and

he decided to remain a prosecutor over 20 years, and then relates the case to Bible quotes would suggest that petitioner needed counsel at the post trial proceedings to properly and effectively present the host of substantial federal constitutional violations. Petitioner argued this violation as due process violation, and equal protection in state and lower federal court. The lower state court's ruled the issue was waived. The state court on appeal ruled that the failure to conduct a colloquy and that petitioner did not have counsel at post trial and sentencing, there was no prejudice. A first year law student would know that a criminal proceedings where a defendant can receive a Life sentence, reasonably needs counsel and effective assistance to confront the adversarial process taking place.

In the interest of justice, this court should consider granting this rehearing motion. This court has yet to consider the relation of the Sixth Amendment at post trial stages for Murder convictions, especially when the state appellate court have ruled in direct conflict with well established federal law.

Finally, the Certiorari petition presents a substantial constitutional violation under the Fifth, Sixth and Fourteenth Amendment. The trial judge instructed the jury with the following words: " I charge you now on identity and on dying declarations. Proof beyond a reasonable doubt of the identity of the defendant as the person who committed the crime is essential to convictions. You have heard the statement of Linda Debose as to the identity of her killers. This statement was made after she

stated several times that she was dying. In the case of dying

" declarations, the awareness of impending death provides the assurance of the truthfulness of the utterance.

N.T.10/24/91. P.457.

This instruction directed a verdict and deprived the petitioner of trial by jury as required by the Fifth, Sixth and Fourteenth Amendment. The heart of the case was whether petitioner was one of the three men who allegedly murdered Linda Debose. The instruction created a mandatory presumption. The predicate facts coming from the trial judges instruction credited the identity made by the deceased as true, because she knew she was dying, and therefore her dying declaration was true. There WAS NO further reason for the jury to deliberate. The judge took away the juries duty to decide the innocence or guilt of petitioner. This instruction was prejudicial . The instruction is a substantial federal constitutional violation, that, if counsel at post trial, would have alleged this error, and if petitioner would have had counsel, this substantial constitutional violation could have been preserved. Sullivan v. Louisiana, 508 U.S.275, 280 (U.S.1993), Justice Scalia writing for the court held that, the denial of the right to a jury verdict of guilt beyond a reasonable doubt, the consequences of which are necessarily unquantifiable and indeterminate is certainly a " structural defect in the constitution of the trial mechanism, which defies analysis by harmless error' standards" under Arizona v Fulminante 499 U.S. 279,309 (1993)." The court goes on to give erroneous jury instructions on conspiracy and aiding and abetting as enough to

convict petitioner of first degree murder, even if he simply aided and abetted, even if he only agree to a assault. Additionally the court instructs the jury that first degree murder is an unintentional killing. This is subsidiary aspects of the entire jury instruction which deprived petitioner of trial by jury and due process. This type of jury instruction is being repeated in every courtroom in Pennsylvania and defendant's are convicted without the state proving each element of the crime of murder beyond a reasonable doubt. The state is being relieved in case after case of its burden of proof. The state allows convictions simply based on accomplice without the state proving that petitioner had the intent, malice, and cruelty of heart to commit first degree murder. This federal constitutional issues is of great importance, because it highlights the important need of counsel at critical stages where, petitioner's substantial federal constitutional rights are at stake. In the instant case, there are three substantial structural federal constitutional errors, that are not harmless error, which go to the heart of the case.

The prosecutor prosecuted three men. Alfred Clark was acquitted by a jury. Louis Riggins was found guilty in a separate jury trial. Petitioner was put in the case after Riggins was arrested three hours after the crime, and he had petitioner's identification on his person, and for that reason alone petitioner was hunted down, and arrested several months later. Alfred Clark was home in bed when arrested. Riggins was coming out of his mothers house. Petitioner was 100 miles away when this crime was committed. Petitioner Fled after his wife told him, the

police was seeking his arrest for murder. As A black Muslim, petitioner knew he was doomed, regardless of innocence. This fear came true, petitioner was tried three times, with all white juries. ON the third trial, he was found guilty by a all white jury. The first two trials were mistrials. The prosecutor had used over 34 peremptory challenges in three trials against citizens who were non-white. Diggs v.Vaughn, 1991, WL 46319-1-2(E.D. Pa. March 27,1991)(record demonstrates conclusively that, at each trial, the prosecutor kept (chief of homicide) careful records of the race of each prospective jurors and a running tally of how many persons of each remained on the venire for possible selection. Federal court granted a new trial, which the prosecutor never appealed. At the fourth trial petitioner was found guilty. At each trial petitioner sought mistrials. The victim was a black woman, and the defendant was black, there was no racial issue in the case, except in the prosecutor's mind. There is no case with such facts, as such presents a question of first impression, should the state have been prevented from taking petitioner back to trial after excluding 34 black citizens from sitting on the jury, not at one trial but three trials? Double jeopardy if at all possible, this is the case. The Fifth Amendment requires no less.

Justice Kennedy from this court held, in Powers v. Ohio, 111 S.Ct 1364 (1994), that, Nor is harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that" overt wrong....casts doubt over the obligation of the

parties, the jury, and indeed the court to adhere to the law throughout the trial..." Powers v. Ohio,at 412; very integrity of the court's is jeopardized when a prosecutor's discrimination " invites cynicism respecting the jury's neutrality. id., at 412 and undermines public confidence in adjudication. Justice Byers in Miller-El v. Dretke, 125 S.Ct. 2317 (2005), concurring opinion stated, I believe it necessary to reconsider Batson test and peremptory challenges.This is the very case to grant rehearing. It is even evident in 2008, the prosecutor will never cease its racial discrimination in jury selection. They are now wise to the excuses to use, thereby avoiding reversal. This court should grant rehearing and accept this question of first impression.

CONCLUSION

For reasons set forth, as well as those contained in the petition for writ of Certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully Submitted

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